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IN THE

Supreme Court of the United States

October Term 1973
No. 73-5772

ANTHONY PASQUALL FARETTA,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF

Opinion Below

The opinion of the California Court of Appeal, Second Appellate District, Division Two, *People v. Faretta*, 2d Crim. 22722, was certified for nonpublication. A copy of this opinion is set forth in the Appendix. (App. pp. 25-30.) A copy of the Order of the California Supreme Court denying a Petition for Hearing is included in the Appendix. (App. p. 32.)

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

Question Presented

Does a defendant in a state criminal action have a federal constitutional right to represent himself without counsel at the trial proceedings?

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.*" (Emphasis added.)

United States Constitution, Amendment XIV, section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code section 686 (in relevant part):

"In a criminal action the defendant is entitled:

. . .

"2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel, *except that* in a capital case he shall be represented in court by counsel at all stages of the preliminary and trial proceedings. . . ."

California Penal Code section 686.1:

"Notwithstanding any other provision of law, the defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings."

California Penal Code section 859:

"When the defendant is charged with the commission of a public offense over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he shall, without unnecessary delay, be taken before a magistrate of the court in which such complaint is on file. The magistrate shall immediately deliver to him a copy of the complaint, inform him that he has a right to have the assistance of counsel, ask him if he desires the assistance of counsel, and allow him reasonable time

to send for counsel. However, in a capital case, the court shall inform the defendant that he must be represented in court by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned for him, and allow him a reasonable time to send for his chosen or assigned counsel. The magistrate must, upon the request of the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer shall, without delay and without a fee, perform that duty. If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him; in a capital case, if the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to defend him. If it appears that the defendant may be a minor, the magistrate shall ascertain whether such is the case, and if the magistrate concludes that it is probable that the defendant is a minor, he shall immediately either notify the parent or guardian of the minor, by telephone or messenger, of the arrest, or appoint counsel to represent the minor."

Penal Code section 987:

"(a) In a noncapital case, if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assistance of counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him.

"(b) In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him that he must be represented by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned to him, and allow him a reasonable time to send for his chosen or assigned counsel. If the defendant is unable to employ counsel, the court shall assign counsel to defend him. If the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to him."

Statement of the Case

On June 21, 1972, the District Attorney of Los Angeles County filed an information in the Superior Court of the State of California for the County of Los Angeles charging petitioner with grand theft, a violation of section 487, subdivision 3, of the California Penal Code. (App. p. 1.) It was alleged that petitioner had four prior felony convictions. (App. pp. 2-3.)

The Los Angeles County Public Defender was appointed to represent petitioner. Petitioner pleaded not guilty. (App. p. 4.) On June 22, 1972, the petitioner filed with the court a document entitled "Petition To Proceed in Propria Persona." (Hereinafter referred to as pro. per.) Petitioner indicated to the court that he had previously represented himself, that he had negotiated a plea bargain in that case, and that he had a high school education. (App. pp. 34-35.)

When asked by the trial court why he thought he could do a better job of defending himself than someone with experience, petitioner answered:

> "THE DEFENDANT: Your Honor, I am very aware that the Public Defender's Office can give you equal representation, no doubt, but I also am considering the fact that the Public Defender's office is very loaded with its, you know, a heavy case load. And given the opportunity to research my case, I can devote all the time I am in custody, being that I can't post the bail as it stands now, to my case. And I feel that, you know, I can establish the proper defense." (App. p. 35.)

The trial court stated that it had been its experience that defendants who represented themselves became "bogged down in making motions" and "they completely neglect the problems of trying the lawsuit and winning it in a trial court." (App. pp. 35-36.) The trial court went on to say:

> ". . . . I have seen more people who represent themselves convict themselves, where if they just sat down and let somebody who knew what they were doing, do it, could well have won it." (App. p. 36.)

The trial court took the matter under submission and stated: "My inclination is to let you—I am telling you this—I think you are making a mistake. . . .

> "And second, when you come in here and you try this lawsuit, you are going to be treated like a lawyer. You aren't going to be treated like a layman. You are going to be treated like a lawyer. And if you don't know your way around, that's too bad." (App. p. 38.)

Subsequently, after petitioner again expressed his desire to represent himself and after the trial court cautioned him that he would have to abide by the rules as a lawyer, the trial court ruled as follows:

> "THE COURT: All right. The Court is going to make a preliminary ruling in this case to the following effect:
>
> "The Court finds that the defendant has demonstrated in the courtroom, both orally and in writing, a capacity to make an intelligent waiver of counsel;
>
> "The Court further finds that defendant understands that he is entitled to have a lawyer ap-

pointed to represent him and that he has made an intelligent waiver of that right.

"I therefore accept the defendant's waiver of his right to counsel and grant him the right to proceed in propria persona. The rights given to the defendant while incarcerated in the Los Angeles County Jail are those set forth in Superior Court Policy Memorandum in re: Pro Per Privileges.

"The Court, however, specifically reserves the right, as this matter proceeds to trial, to continually evaluate the capacity and the ability of this defendant to act as his own attorney, with the clear understanding that if at any time it becomes apparent to the Court that the defendant cannot act as his own attorney, his pro per status will be revoked and an attorney will be appointed to represent him." (App. p. 40.)

On July 13, 1972, the court made further inquiry of petitioner with respect to his ability to represent himself. The colloquy was as follows:

"THE COURT: In the Faretta matter, I brought you back down here to do some reconsideration as to whether or not you should continue to represent yourself.

"How have you been getting along on your research?

"THE DEFENDANT: Not bad, your Honor.

"Last night I put in the mail a 995 motion and it should be with the Clerk within the next day or two.

"THE COURT: Have you been preparing yourself for the intricacies of the trial of the matter?

"THE DEFENDANT: Well, your Honor, I was hoping that the case could possibly be disposed of on the 995.

"Mrs. Ayers informed me yesterday that it was the Court's policy to hear the pretrial motions at the time of trial. If possible, your Honor, I would like a date set as soon as the Court deems adequate after they receive the motion, sometime before trial.

"THE COURT: Let's see how you have been doing on your research.

"How many exceptions are there to the hearsay rule?

"THE DEFENDANT: Well, the hearsay rule would, I guess, be called the best evidence rule, your Honor. And there are several exceptions in case law, but in actual statutory law, I don't feel there is none.

"THE COURT: What are the challenges to the jury for cause?

"THE DEFENDANT: Well, there is twelve peremptory challenges.

"THE COURT: And how many for cause?

"THE DEFENDANT: Well, as many as the Court deems valid.

"THE COURT: And what are they? What are the grounds for challenging a juror for cause?

"THE DEFENDANT: Well, numerous grounds to challenge a witness—I mean, a juror, your Honor, one being the juror is perhaps suffered, was a victim of the same type of offense, might be prejudice toward the defendant. Any substantial ground that might make the juror prejudice toward the defendant.

"THE COURT: Anything else?

"THE DEFENDANT: Well, a relative perhaps of the victim.

"THE COURT: Have you taken a look at that code section to see what it is?

"THE DEFENDANT: Challenge a juror?

"THE COURT: Yes.

"THE DEFENDANT: Yes, your Honor. I have done—

"THE COURT: What is the code section?

"THE DEFENDANT: On voir diring a jury, your Honor?

"THE COURT: Yes.

"THE DEFENDANT: I am not aware of the section right offhand.

"THE COURT: What code is it in?

"THE DEFENDANT: Well, the research I have done on challenging would be in Witkins Jurisprudence.

"THE COURT: Have you looked at any of the codes to see where these various things are taken up?

"THE DEFENDANT: No, your Honor, I haven't.

"THE COURT: Have you looked in any of the California Codes with reference to trial procedure?

"THE DEFENDANT: Yes, your Honor.

"THE COURT: What codes?

"THE DEFENDANT: I have done extensive research in the Penal Code, your Honor, and the Civil Code.

"THE COURT: If you have done extensive research into it, then tell me about it.

"THE DEFENDANT: On empaneling a jury, your Honor?

"THE COURT: Yes.

"THE DEFENDANT: Well, the District Attorney and the defendant, defense counsel, has both the right to 12 peremptory challenges of a jury. These 12 challenges are undisputable. Any reason that the defense or prosecution should feel that a juror would be inadequate to try the case or to rule on a case, they may then discharge that juror.

"But if there is a valid challenge due to grounds of prejudice or some other grounds, that these aren't considered in the 12 peremptory challenges. There are numerous and the defendant, the defense and the prosecution both have the right to make any inquiry to the jury as to their feelings toward the case.

"THE COURT: The Court having observed the conduct and the demeanor of the defendant, in addition to what he said, does not believe that the defendant has made an intelligent and knowing waiver of his constitutional right to be represented by an attorney. Also taking into consideration the recent case of People versus Sharp, where the defendant apparently does not have a constitutional right to represent himself, the Court finds that the ends of justice and requirements of due process require that the prior order permitting the defendant to represent himself in pro per should be and is hereby revoked. That privilege is terminated.

"The Public Defender is appointed to represent the defendant in this case." (App. pp. 46-48.)

Petitioner then stated:

> "THE DEFENDANT: Your Honor, if I might again be heard on the matter. According to the Sixth Amendment, a defendant has the right to assistance of counsel of his choice, and I believe those are the words that are used, when I say 'assistance.'
>
> "Now, if the Court would find it appropriate that defendant act as co-counsel in this matter, I would then move that the Court would make that order." (App. p. 49.)

The court denied petitioner's motion to act as co-counsel. (App. p. 49.)

Subsequently, petitioner on two occasions requested the appointment of counsel other than the public defender, and these requests were denied. (App. pp. 54, 58-59.)

Petitioner denied the prior felony convictions. Trial was by jury. (App. pp. 10-12.) Petitioner was found guilty as charged, and the prior felony convictions were found to be true. (App. pp. 13-17.)

The trial court struck the prior felony convictions. Probation was denied, and petitioner was sentenced to the state prison for the term prescribed by law. (App. p. 21.)

Petitioner appealed from the judgment of conviction. (App. p. 23.) On June 26, 1973, the California Court of Appeal, Second Appellate District, Division Two, rendered an unpublished opinion affirming the guilt of petitioner as to one count of grand theft, a viola-

tion of section 487, subdivision 3, of the California Penal Code. (App. pp. 25-30.) The Court of Appeal held:

> ". . . Faretta had no constitutional right to represent himself. (People v. Sharp, 7 Cal. 3d 448, 459-460.) And we cannot say that the trial court abused its discretion in concluding that Faretta had not made a knowing and intelligent waiver of his right to be represented by counsel. (People v. Floyd, 1 Cal. 3d 694, 702-705.) Despite his desire to be his own attorney, Faretta did not appear aware of the possible consequences of waiving the opportunity for skilled and experienced representation at trial.
>
> "Smith v. Superior Court, 68 Cal.2d 547, relied on by Faretta, is not in point. Smith involved the right of the trial court to replace a court-appointed attorney based on the court's subjective belief that the attorney was not competent to handle the case. The defendant's understanding of the consequences of retaining the attorney was not in issue." (App. p. 27.)

On June 16, 1973, the California Court of Appeal denied a petition for rehearing. On August 22, 1973, the California Supreme Court denied a petition for hearing. Both of these actions were taken without opinions. (App. p. 32.)

On November 17, 1973, the motion to proceed *in forma pauperis* and the petition for writ of certiorari were filed. On March 18, 1974, this Court granted the motion for leave to proceed *in forma pauperis* and granted the writ of certiorari. (App. p. 65.)

Summary of Argument

A defendant has no federal constitutional right to represent himself at a criminal trial without counsel. History provides no precedent for a constitutional right of self-representation. No such right existed under the English common law or has been established under the Federal Constitution. Without historical basis, there is no foundation upon which to base any interpretation of the Sixth Amendment or the Due Process Clause of the Fourteenth as conferring a right to self-representation. Similar use of history was made by this Court in *Singer v. United States,* 380 U.S. 24, 26 (1965) in determining that the right to trial by jury did not create a federal right to waive jury.

The common law of England provides no basis for a right to self-representation. Instead of a right, self-representation was a tyrannical practice which prohibited counsel in felony proceedings. The Crown had forbade counsel in order to be able to weigh down the accused with his own ignorance, thus insuring convictions sought by the royal throne.

Nor may a constitutional right to self-representation be found in the American colonial charters or post-revolution state constitutions, since each of these documents varied on this point. Each individual colony or state either specifically mentioned or ignored self-representation. It was not left to implication.

The fact that self-representation is not of federal constitutional dimension is borne out by the enactment of the Judiciary Act of 1789. The Judiciary Act was debated by Congress at the same time as the Bill of Rights. The Judiciary Act set forth specifically both a right to counsel and a right to self-representation. The Bill of Rights established only a right to counsel. The

Framers of the Bill of Rights must have been aware of the federal statutory right to self-representation, but still refused to elevate such a procedure to a constitutional level.

The Sixth Amendment itself does not provide that an accused has the right to defend himself at criminal proceedings but, on the contrary, provides that an accused "shall have the assistance of counsel for his defense."

Self-representation at trial is not a "correlative right" of the right to assistance of counsel. This Court should follow the rationale of *Singer v. United States, supra,* 380 U.S. 24, 34-35 (1965), where it is stated:

> ". . . the ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."

Thus, the fact that an accused has the ability to waive his right to counsel does not mean that he has the right to insist upon the opposite of that right, namely, the right to defend himself.

Due process of law does not require that a defendant be allowed to represent himself. The core of due process is to insure an accused a fair trial by affording him those rights which will best allow him to successfully defend against charges. By its decisions this Court has long held that the goal of a fair trial can only be achieved by affording an accused counsel at trial. *See Powell v. Alabama,* 287 U.S. 45 (1932); *Gideon v. Wainwright, supra,* 372 U.S. 335 (1963). Moreover, the government has a paramount obligation to see that the accused receives a fair trial, which is one where he is represented by counsel. Thus, due process requires that a defendant receive an objectively fair trial and not one dictated by his subjective whims.

Representation by counsel insures fair and efficient court procedures. Under the recent cases of *Illinois v. Allen*, 397 U.S. 337, 343 (1970) and *Taylor v. United States*, 414 U.S. 17, 20 (1973), a trial may continue without a defendant being present if he is unruly or he has fled in the course of the proceedings. The presence of counsel makes fair what otherwise could become an inquisitional proceeding if counsel were not present to protect the interests of the accused. Advisory counsel would be of no avail, since the degree of his involvement in the case would at best be uncertain and at worst an ordeal. In addition, criminal law includes very sophisticated defenses, so complex as to drown a layman in their intricacies.

If this Court holds that there is a constitutional right to represent oneself, then this right is a limited right When a defendant who represents himself appeals his conviction, he cannot be allowed to argue his trial was unfair because he represented himself or raise issues concerning irregularities that occurred during trial as a result of the manner in which he represented himself. Moreover, an accused cannot be in a position where he can manipulate the proceedings so that if he is not acquitted at trial, he will gain a reversal on appeal.

Furthermore, if it is held that there is a constitutional right to self-representation, then the denial of that right is subject to the harmless error test of *Chapman v. California*, 386 U.S. 18, 23 (1967). Since a fair trial is achieved when one is represented by counsel, the denial of the right to self-representation is not the denial of a constitutional right which is basic to a fair trial. The accused should be entitled to relief only if he can show prejudice at trial from the denial of his request to represent himself.

ARGUMENT

I

UNDER THE FEDERAL CONSTITUTION THERE IS NO RIGHT TO SELF-REPRESENTATION IN CRIMINAL PROCEEDINGS

The Federal Constitution provides for no right to appear without counsel in a criminal trial. This proposition of law is borne out by both the Anglo-American historical experience and a proper analysis of the most fundamental propositions of legal analysis.

A. Historically There Was No Right to Self-Representation in Criminal Proceedings

There is no constitutional right to self-representation in criminal proceedings, as observed in both English common law and the history of our own nation. The use of history is peculiarly relevant to a determination of whether or not a right to self-representation exists. In *Singer v. United States, supra,* 380 U.S. 24, 26, 27 (1965) it was argued by the defendant that the right to jury trial also contained within it the negative "right to waive jury." This Court disposed of this allegation by means of historical analysis to show that such a right never existed. In the same manner, history shows that, other than by specific statute, specific colonial charter, or specific state constitution, a "right of self-representation" in criminal proceedings never existed and as such was never engrafted into the Federal Bill of Rights.

1. The English Common Law Experience

Under the common law of medieval and early modern England, self-representation in felony or treason cases was a tyrannical practice and never was a right

under the common law. Grano, *The Right to Counsel: Collateral Issues Affecting Due Process,* 54 Minn. L. Rev. 1175, 1190-92 (1970) (hereinafter cited as Grano). Not only was self-representation in felony and treason matters a practice, but it was one of "tyrannical nature" since right to counsel was prohibited in those cases.

As this Court stated in *Holden v. Hardy,* 169 U.S. 366, 386 (1897):

> "Even before the adoption of the Constitution, much had been done towards mitigating the severity of the common law, particularly in the administration of its criminal branch. A number of capital crimes in this country at least had been largely decreased. Trial by ordeal or by battle had never existed here and had fallen into disuse in England. The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. For the credit of the American colonies, let it be said that full press of the doctrine had never obtained a foothold there."

The story of the struggle for the right to counsel is in many ways the story of the rise of the legal profession in Anglo-American culture. "Before the end of the thirteenth century, there already exists a legal profession, a class of men who make money by representing litigants before the courts and giving legal advice." *See* F. Pollock and F. Maitland, *The History of English Law* 211 (2d ed. 1898).

Ironically, under the common law, a defendant had a right to counsel as to misdemeanors, but during the sixteenth and seventeenth centuries, he had no right to counsel in cases of treason and felony.[1] *I. J. Stephen, A History of the Criminal Law of England* 341 (1883) (hereinafter cited as *Stephen*).

The theory of trial and guilt was different under the common law than in the modern scheme of governmental practice. As Sir James Fitzjames Stephen, the noted nineteenth century legal scholar, has written:

> ". . . In nearly every one of the trials for the Popish Plot, and, indeed, in all the trials of that time, the sentiment continually displays itself, that the prisoner is half, or more than half, proved to be an enemy to the King, and that, in the struggle between the King and the suspected man, all advantages are to be secured to the King, whose safety is far more important to the public than the life of such a questionable person as the prisoner. A criminal trial in those days was not unlike a race between the King and the prisoner, in which the King had a long start and the prisoner was heavily weighted." *I. Stephen* at 397.

Lord Edward Coke in his *Institutes* discussed the reasons why, under the common law, a prisoner could

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[1]A defendant was required to have counsel in proceedings before the Star Chamber, the reason being, apparently, that defendants before that body

> ". . . were required to get their answers signed by counsel. The effect of this rule, and probably its object was, that no defence could be put before the Court which counsel would not take the responsibility of signing—a responsibility which, at that time, was extremely serious. If counsel would not sign the defendant's answer he was taken to have confessed the information." I *Stephen* at p. 341.

not have counsel in cases of treason or felony. He stated:

> ". . . First, that the testimonies and the proofs of the offence ought to be so clear and manifest, as there can be no defense of it. * Secondly, the court ought to be in stead of councell for the prisoner, to see that nothing be urged against him contrary to law and right; nay, any learned man that is present may inform the court for the benefit of the prisoner, of any thing that may make the proceedings erroneous." E. Coke, *III Institutes,* Chapter 2 [29].[2]

The absurdity of those two reasons for not giving counsel was fully shown in the notorious State Trials of that time. Rather these two excuses were used by the Crown to insure a conviction. By saying that ". . . the testimonies and the proofs of the offense ought to be so clear and manifest, as there can be no defense of it" is to declare a defendant's guilt before trial, a concept obnoxious to any assertion of a "right." Secondly, the fallacy of having the trial judge act as counsel for the defense is illustrated by two trials of the common law period.

In 1590, John Udall, a Puritan minister, was tried for publishing a book that attacked the established church. Udall requested the court:

> "My case is rare, and such as hath not been heard of heretofore, and consisteth upon divers points of law; I humbly crave of your lordship to grant me to answer by counsel, if it may be."

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[2]It should be noted, however, that the right to counsel was afforded persons accused of treason or felony in Scotland. Salmon, *A New Abridgment and Critical Revision of the State Trials and Impeachments for High Treason,* at 336 (1738) (hereinafter cited as *Salmon*).

The court denied him counsel. Udall asked the court how many errors he was allowed by law to challenge. The court answered, "Nay, I am not to tell you that. I sit to judge, and not to give you counsel." T. Howell, *State Trials,* 1278 (1816) (hereinafter cited as *Howell*).

An even more notorious example was the trial of William Penn, the founder of Pennsylvania, and William Mead in 1670 arising out of the preaching of their faith. Testimony was taken to the effect that William Penn was preaching in the streets. The court recorder asked Mead: "What say you, Mr. Mead, were you there?" Mead answered:

> "It is a maxim in your own law, 'Nemo tenetur accusare seipsun,' which if it be not true Latin, I am sure it is true English, 'That no man is bound to accuse himself.' And why does thou offer to insnare me with such a question? Doth not this show thy malice? Is this like unto a judge, that ought to be counsel for the prisoner at the bar?" VI *Howell* at 958.

A practice did develop that, while a defendant in a treason or felony trial could not have counsel represent him, he could have counsel to advise him or argue points of law upon request to the court. I *Stephen,* at 424.

Thus, for example, in the trial of Archbishop Laud for high treason in 1643, the request that counsel might be allowed to argue points of law was granted. *Salmon,* at 211, 212. It can be seen that up to the period of the "Glorious Revolution" in 1688, there was no right to counsel in cases of treason and felony, even though counsel had been requested. After the "Glori-

ous Revolution," in which the Stuart line was driven forever from the throne of England, an act was passed allowing counsel in cases of trials for treason and misprison of treason. VII *William* III, ch. 3, § 1 (1696).

Thus, in 1696, counsel was to be allowed in the above-mentioned cases. The reason for this act was described by the early nineteenth century legal commentator, Joseph Chitty, as follows:

> ". . . In prosecutions for treason, it was feared that the very weight of the charge would tend to depress the prisoner, while from its political nature, it was too likely to be imputed, in bad times, to the innocent who might be obnoxious," I J. Chitty, *A Practical Treatise on the Criminal Law* 409 (1816).

The fact that counsel at trial was deemed to be so desired is best shown in the following circumstances. Robert Charnock, in 1695, was being tried for high treason shortly after the act permitting counsel in treason cases had been passed but before it was to come into effect.

> ". . . At their Arraignment, Mr. Charnock insisted on their having Counsel, and a Copy of their Indictment according to a late Act; and being told, that Act did not commence till Lady-Day, he observed, that the Preamble of that Act said, 'That this was reasonable;' and if it was so, it was as reasonable to Day as it would be a Fortnight hence. But this was over-ruled by the Court, and they were allowed neither." Salmon at 650.

Under the Stuarts, counsel was not allowed in cases of treason. Yet, because of the aforementioned

act under William III, Jacobite prisoners involved in the rebellions of 1716 and 1746 were able to have

> ". . . at least, trained advocates to plead their cause, and if the results were not in the majority of cases favourable to their hopes, the reason must be sought in the temper of the times and their own obvious share in the risings." B. Kelly, *A Short History of the English Bar*, 69 (1908) (hereinafter cited as *Kelly*).

The right to counsel in cases of high treason was of limited value to the typical criminal defendant. Such an offense was a comparatively rare occurrence, while charges of felony were multitudinous. *Kelly*, at 111-12. Thus, if any "right" was sought after in early England, it was representation by counsel.

Self-representation in felony trials was a practice forced upon defendants so as to insure the Crown a conviction of those who might possibly endanger the "Divine Right of Kings," which was the hallmark of the Stuart monarchy. It was as much a right as the rack, screw or branding iron was a right, since its effect was the same in protection of the Royal person against dissension in the Kingdom.

Thus, in the latter part of the eighteenth century at the time close to the birth of the American republic, counsel in England was allowed only in cases of misdemeanor and high treason. As Sir William Blackstone stated:

> ". . . But it is a settled rule at common law that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise proper to be debated. A rule which (however it may be palliat-

ed under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man which yet is allowed him in prosecutions for every petty trespass?" W. Blackstone, *4 Commentaries*,* 355-57.

In the middle of the eighteenth century, the practice arose allowing counsel to be more active in criminal cases. Sometimes counsel was allowed to do everything for the accused except address the jury. I *Stephen* at 424. It appears that such was merely an arbitrary practice depending on the whims of the trial judge. A request for counsel could be rejected. One accused was obliged to cross-examine witnesses without the aid of counsel and to examine for himself witnesses called to prove the defense of insanity which he had set up. I *Steven* at 424.

Thus, in the eighteenth century, it appears that the role of counsel in felony cases was very much limited or expanded depending on the particular idosyncrasies of the individual trial judge. W. Beaney, *The Right to Counsel in American Courts* 10 (1955) (hereinafter cited as *Beaney*).

The right to counsel in cases of felony did not become a part of the law of England until 1836, in the reign of William IV. 6 *and* 7 *William* IV, *ch.* 114, § 1 (1836). Thus, the right to counsel in England in felony cases was not established until quite late in Eng-

lish history and then it was conferred only as a statutory right.[3]

Therefore in light of the tyrannical practice in England of not allowing counsel first in treason and felony trials, and then in cases of felony, the right to counsel may be seen to have evolved as a reaction to the practice of enforced self-representation.

2. The Early American Experience

The American Colonial experience is rather unique. There was a somewhat inconsistent attitude in early Colonial America towards attorneys in that there were few of them and they were distrusted even if they were needed. "But as soon as a settled society posed problems for which the lawyers had an answer or at least a skill, the lawyers appeared in force and flourished in spite of animosity." L. Friedman, *A History of American Law*, 84 (1973).

The question of the extent to which counsel was allowed in colonial trials as opposed to the mother country is somewhat open. *Beaney* at 15.

Thus, in 1641, the Massachusetts Body of Liberties was enacted in section 26:

> "Every man that findeth himself unfit to plead his owne cause in any Court shall have Libertie to

[3]Even today the right to counsel in felony cases is one of statute. III *Halsbury's Laws of England*, 624, 625, 1141, 1142 (4th ed. 1973). It is true that a person charged with a criminal offense in England today cannot have counsel forced upon him against his will. *See Rex v. Woodward* (1944) K.B. 118. Unfortunately, the court in *Woodward* did not discuss the basis of their opinion in any detail. Furthermore, in light of the fact that the right to counsel in England is of statutory origin, it appears that *Rex v. Woodward, supra*, would be at most of limited precedential value.

> imploy any man against whom the Court doth not except, to help him, Provided he give him noe fee or reward for his paines. This shall not exempt the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him." I B. Schwartz, *The Bill of Rights: A Documentary History* at 74 (1971) (hereinafter cited as *Schwartz*).

The colonies and the revolutionary governments came up with all types of "hodgepodges," charters, declarations, and constitutions, sometimes giving a right to counsel and/or the "right" to self-representation as well as counsel. *See*, I *Schwartz*, 129 131, 170, 271, 276, 278, 282, 301, 316, 323, 338, 342, 371.

While some charters or state constitutions set forth self-representation as a right, others did not. In 1683 in the Pennsylvania Frame of Government, a defendant could personally plead his own cause or, if unable to, could use a friend.[4] In 1701, another provision was made to allow criminals to have the same privileges of witnesses and counsel as the prosecutors. *Beaney*, at 16.

In Delaware, the charter of 1701 gave "criminals" the same privileges of counsel as prosecutors. *Beaney*, at 17. In 1709, a statute was passed in Pennsylvania appointing counsel in cases involving capital offenses. *Beaney*, at 17. South Carolina in 1731, gave persons accused of treason, murder, felony and other capital offenses, the right to counsel. *Beaney*, at 17. Virginia permitted the accused in 1734 to have counsel in all

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[4]Petitioner's assertion that those provisions in light of Penn's trial in England, implies a "right" of self-representation is a *non sequitur*. (Pet. Op. Br. pp. 34, 35.) The provision applies to civil cases as well as is therefore important only in light of the sparseness of attorneys in early colonial America.

capital cases upon request of the court, but it appeared that this was merely a restatement of the English practice permitting counsel to argue points of law. *Beaney*, at 17.[5]

Rhode Island in 1660 had enacted a provision which, in effect, had a similar result as Virginia. *Beaney*, at 17, 18. At the time of the American Revolution, when the colonies finally drove out the British, they also, in so doing, forced out many other restrictions of the common law.

It is interesting to note that at least four of the states—Pennsylvania, Vermont, Massachusetts, and New Hampshire—made provision for both counsel and self-representation. I *Schwartz* at 265, 323, 342, 377. If a state desired to create a right of self-representation, it specifically set one up in clear unequivocal language. This is important in light of the philosophic temper of the times, whether it be reflected in the writings of Thomas Paine or Alexander Hamilton. Examples of thought and philosophy of the purpose of a Bill of Rights in the days of the Birth of the Republic appear to declare that it was a specified series of rights granted by the sovereign power to the people.

The fact that at least four states had provisions allowing both right to counsel and self-representation clearly shows that there was no generally recognized right to self-representation. Thomas Paine, the great pamphleteer and patriot of eighteenth century America, had written a commentary in defense of the Penn-

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[5]An earlier act, interestingly enough, had allowed slaveowners to make a full defense of slaves accused of a capital offense, causing the following comment, with justifiable cynicism, "Slaves were too valuable to be hanged without due deliberation.'" (Footnote omitted.) *Beaney*, 17.

sylvania Bill of Rights.[6] In this document Paine stated: "The Bill of Rights should be a plain positive declaration of the rights themselves." I *Schwartz* at 315.

Alexander Hamilton's view of a Bill of Rights was similar. In *The Federalist Papers*, Hamilton, while opposed to a Bill of Rights, defined one as follows: "It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince." *The Federalist* No. 84 at 512-13. (C. Rossiter Ed. 1961.) The language of this Court in *Singer v. United States, supra*, 380 U.S. 24, 31, relating to the allegation of a "right" to waive jury not found in the Bill of Rights is applicable to the alleged "right" of self-representation in felony trials; "Indeed, if there had been recognition of such a right, it would be difficult to understand why . . . the Sixth Amendment were not drafted in terms which recognized an option."

The proponents and the authors of the Bill of Rights were both idealistic and pragmatic men who must have been familiar with the provisions of the state constitutions of Pennyslvania, Vermont, Massachusetss, and New Hampshire which provided for both right to coun-

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[6]In Article 58 of the Georgia Constitution of 1777 it was stated:

> "No person shall be allowed to plead in the courts of law in this State, except those who are authorized so to do by the house of assembly; and if any person so authorized shall be found guilty of malpractice before the house of assembly, they shall have power to suspend them. This is not intended to exclude any person from that inherent privilege of every freeman, the liberty to plead his own case." I *Schwartz* at 299-300.

This provision, of course, applies only to civil cases as the right to counsel had not been extended to criminal cases in Georgia at that time. *Beaney* at 19.

sel and right to self-representation. In the Bill of Rights, provision was specifically made for right to counsel but not for self-representation. Section 35 of the Judiciary Act of 1789 provided:

> "*And be it further enacted*, that in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein." Judiciary Act of 1789, ch. 20, I Stat. 73, 92 (1789).

At the same time Congress was debating the Bill of Rights, they were debating the Judiciary Act in Congress, which made the "right" to representation merely statutory.

In *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964), which found a "right" to self-representation, the Court of Appeals stated:

> "Section 35 of the Judiciary Act of 1789, I Stat. 73, 92 (1789), passed by the First Congress and signed by President Washington, one day before the same Congress proposed the Sixth Amendment provided 'That in all the courts of the United States the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.'
>
> This statute gives more elaborate expression to the meaning of the terse language of the Bill of Rights which indicates, we think, that the constitutional rights to 'assistance of counsel" was intended to include the right of defendants in criminal cases 'to plead and manage their own causes personally.'"

However, such a conclusion is based upon flawed legal analysis while both the Sixth Amendment to the Federal Constitution and the Judicial Act of 1789 give a defendant a right to counsel, only the Judiciary Act of 1789 gives a defendant the right to self-representation. Thus, the framers of the Bill of Rights and those who debated its merits were familiar both with the language of the Sixth Amendment and the language in the Judiciary Act. Giving a defendant both a right to counsel and a right to self-representation in the Judiciary Act while giving only an express right to counsel in the Sixth Amendment, would indicate that the founding fathers intended that the right to counsel should be one of constitutional dimensions while the "right" to self-representation would be merely statutory. Thus, a defendant would have a constitutional and a statutory right to representation with counsel but only a statutory right as to self-representation. The framers in adopting the Bill of Rights, did so with their eyes open. They must have been familiar with the states which had constitutions giving a state "right" to self-representation and they must have been familiar with the Judiciary Act which they were debating at the same time as the Bill of Rights which also provided for self-representation. Yet, in spite of this awareness, the framers of the Bill of Rights specifically mentioned only the right to counsel. The omission of any mention of the right to self-representation must have been purposeful.

It is true that the debates in Congress as to both the Judiciary Act and the Bill of Rights are bereft of discussion on this point. Bearing the definition of Thomas Paine in mind that a Bill of Rights should be

a "plain, positive declaration of the rights themselves," along with the definition of Alexander Hamilton, there can be no other reasonable interpretation than that the framers purposely did not make self-representation a constitutional right.

Tracing the history of the right to counsel from its medieval common law origins, it is observed that self-representation in the common law of England was not a right but a practice to insure power remained in the Crown without meaningful dissent. In the colonial revolutionary experiences of America, while self-representation was made a state right in several states, the statutory federal right embodied in the Judiciary Act of 1789 is significantly absent from the Bill of Rights itself. It thus appears that the framers of the Bill of Rights probably had the medieval common law experience with all of its terrors in mind when they provided for a right to counsel but omitted any right to self-representation. From the English experience, the absence of counsel was not a right but rather the tool of despotic kings.

The expansion of the right to counsel within the trial process has been an important function of this Court, especially in this century. Landmark cases such as *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) and *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), are symbols of this Court's policy to encourage and implement the right to counsel in the trial process and to insure that an orderly trial within the bounds of due process takes place. From the Middle Ages in England to the present United States, the lesson of history mandates full recognition of the right to counsel at trial but admits of no federal constitutional right of self-representation.

B. Self-Representation at a Criminal Trial Is Not a "Correlative Right" of the Right to Assistance of Counsel

The Federal Constitution expressly provides in the Sixth Amendment that an accused in a criminal prosecution "shall have the assistance of counsel for his defense," but does *not* expressly provide that he has the right to defend himself.[7] This Court has never ruled directly on the issue of the right to represent oneself in a criminal proceeding.

The argument that a defendant does have the right to defend himself in a criminal proceeding has been supported by the theory that the right to defend oneself is a "correlative right" of the right to assistance of counsel. The "correlative right" theory was expressed in dictum in this Court's decision in *Adams v. United States ex rel. McCann,* 317 U.S. 269, 279 (1942). This theory is to the effect that an express right such as right to counsel also implies a right to appear without counsel.[8] The language in *Adams* was not essential to the holding of *Adams* that a defendant who has intelligently waived his right to counsel may also waive his right to jury trial.

In *Johnson v. Zerbst,* 304 U.S. 458, 463 (1938), this Court held:

> ". . . The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."

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[7]The right to defend oneself in federal courts is provided for by statute. 28 U.S.C. § 1654.

[8]Similar dictum is found in *Carter v. Illinois,* 329 U.S. 173, 174-75 (1946); *Moore v. Michigan,* 355 U.S. 155, 161 (1957); *see also Price v. Johnston,* 334 U.S. 266, 285 (1947).

But to state that a trial is valid where there is a knowing and intelligent waiver of counsel is quite different from saying that a defendant has a constitutional right to waive counsel and defend himself. This Court should follow the rationale in *Singer v. United States, supra,* 380 U.S. at 34-35, that "The ability to waive a constitutional right does not ordinarily carry with it the right to insist on the opposite of that right . . . ."

At issue in *Singer* was Rule 23(a) of the Federal Rules of Criminal Procedure which stated that an accused's waiver of jury trial was subject to the consent of the trial judge and the prosecutor. The petitioner argued that this rule was unconstitutional because in a federal criminal case an accused had not only a constitutional right to a jury trial but also a "correlative right" to have his case decided by the trial court if he considered such a trial to be to his advantage. This Court held that there was no federally recognized right to a trial before a judge sitting alone, but a defendant can in some instances waive his right to a trial by jury.

The Court then went on to hold in *Singer* that the waiver of jury could be conditioned upon the consent of the prosecuting attorney and trial judge because, again:

> "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. . . ." 380 U.S. at 34-35.

This reasoning should be applied to the issue before this Court. The fact that a defendant has the ability to waive his right to counsel does not mean that he has the right to insist upon the opposite of that right, namely, the right to defend himself.

Of note is the case of *Juelich v. United States,* 342 F.2d 29, 31-32 (5th Cir. 1965), where the issue was the right of a prisoner to dismiss court-appointed counsel on a motion to vacate sentence. The Fifth Circuit stated that there was no need to decide whether the right to defend *pro se* in a criminal prosecution was a constitutionally protected right because the Sixth Amendment did not apply. But the Court of Appeals pointed out that the Ninth Circuit in *Dillon v. United States,* 307 F.2d 445, 446-47 (9th Cir. 1962), stated that there could be a requirement of counsel under the Fifth Amendment. The Court in *Dillon* stated:

> "As this court has pointed out, the appointment of counsel may sometimes be mandatory even in those areas in which the Sixth Amendment does not apply. This is true when the circumstances of a defendant or the difficulties involved in presenting a particular matter are such that a fair and meaningful hearing cannot be had without the aid of counsel. Compliance with the due process clause of the Fifth Amendment then requires that counsel be appointed."

The Court in *Juelich* held:

> ". . . In such Fifth Amendment cases, it can hardly be argued that there is any 'correlative right to dispense with a lawyer's held' for that would imply the *reductio ad absurdum* that a hearing *not* 'fair and meaningful' is a constitutionally protected right. The courts have not yet gone that far." (Emphasis by the court.)

This reasoning should be equally applicable to proceedings where the right to counsel does apply. The Sixth Amendment provides that an accused shall have

the right to assistance of counsel so that he will receive a fair and meaningful trial. Thus, it can hardly be argued that there is a "correlative right" to dispense with the assistance of counsel because that would mean that a trial *not* fair and meaningful is a constitutionally protected right.

C. Due Process Does Not Require That a Defendant Be Allowed to Represent Himself

1. Due Process Requires That a Defendant Be Represented by Counsel to Insure That He Receives a Fair Trial

Petitioner argues that due process requires that he be allowed to defend himself, since he is entitled to present his defense as he sees fit and "according to his own rights." (Pet. Op. Br. pp. 40-53.) To the contrary, due process does not require that a defendant be allowed to represent himself. Indeed, the dictates of due process are best served when a defendant is represented by counsel.

In *Lisenba v. California,* 314 U.S. 219, 236 (1941) this Court defined due process of law in the criminal trial context as follows:

> ". . . denial of due process is the failure to observe that fundamental fairness essential to the concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

The concept of a fair trial was put in proper focus by the California Supreme Court in *People v. Sharp,*

7 Cal.3d 448, 460, 103 Cal.Rptr. 233, 240-41, 499 P.2d 489, 496-97 (1972), *cert. denied*, 410 U.S. 944 (1973), when it stated:

> ". . . The fairness of a trial is not to be predicated on any purported right of an accused to proceedings which are planned, directed or conducted by him, but rather on proceedings which will accord him the fullest opportunity to preserve all trial rights and successfully defend against charges."

Therefore, the core of due process is to insure an accused a fair trial by affording him those rights which will best allow him to successfully defend against charges.

By its decisions, this Court has long held that the goal of a fair trial can only be achieved by affording an accused counsel at trial. *See Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963). The need for counsel at trial was cogently stated by Justice Sutherland:

> ". . . . Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether an indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces

> the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell v. Alabama, supra,* 287 U.S. at 69.

Thus, the dictates of due process do not require that the accused have the right to defend himself at trial, but instead require that an accused receive a fair trial. This is achieved when an accused is represented at trial by counsel.[9]

Furthermore, this Court in *Singer v. United States, supra,* 380 U.S. at 36, stated that there is a governmental interest that its citizens receive a fair trial. This Court stated:

> ". . . The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair trial result . . . ."

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[9]As was even stated by the Second Circuit in *United States v. Spencer,* 439 F.2d 1047, 1051 (2d Cir. 1971) (which has decided the leading federal cases holding that an accused has a right to defend himself):

> ". . . It seems to us that no matter how intelligent or educated a layman might be, he lacks the skill and knowledge to defend himself adequately."

This passage from the *Singer* opinion echoed the sentiment, also expressed in *Berger v. United States*, 295 U.S. 78, 88 (1934), that:

> ". . . the government attorney in a criminal prosecution is not an ordinary party to a controversy but a 'servant of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer.' " 380 U.S. at 37.

Applying the governmental interest discussed in *Singer* to the issue now before this Court, the government has an interest in seeing that the trial is conducted in a manner which the Constitution regards as most likely to produce a fair trial result, and where the innocent does not suffer, namely, a trial where the defendant is represented by counsel. Thus, contrary to petitioner's assertion, the government as a litigant does have an interest in having a defendant represented by counsel because the government has a paramount obligation to see that the accused receives a fair trial. (Pet. Op. Br. p. 30.)

2. Due Process Requires That a Defendant Receive an Objectively Fair Trial and Not One Dictated by the Defendant's Subjective Whims

Petitioner argues that a defendant has the right "to go to jail under his own banner" (*United States ex rel. Maldanado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966)). (Pet. Op. Br. pp. 43-45.) A commentator put this interest in perspective when he observed:

> "Nevertheless, it seems that there are government interests more important than the interest in protecting individual autonomy or in guarantee-

ing a trial that is subjectively fair. First, it should be remembered that Singer contended that a jury trial was not the most advantageous procedure for him, but the Supreme Court upheld the government's interest in utilizing the procedure deemed fairest by objective standards. Second, the government has interests that go beyond the accused. A strong and just government must supervise and restrict its own behavior to assure its continued strength and popular support, which depend, to some extent, on protecting the security of the rest of the members of the community. This security is maintained only if the community is convinced that the government will not deprive anyone of his rights except by methods objectively fair. Therefore, the government must have the right to demand that it not deviate from certain standards, even if the individual proceeded against would see no transgression." (Footnotes omitted.) *Grano* at 1196.

The idea that an accused should have the right to "go down under his own banner" sounds like a noble end, but viewed in the cold reality of concrete cases, it loses its appeal. This is true in most cases since an attorney will better defend an indigent than such a defendant will defend himself. (*Cf. Powell v. Alabama, supra.*) It is especially true in those cases where the penalty is severe. This problem is pointed up by the struggle that the Supreme Court of New Jersey had with the issue in *State v. Davis,* 45 N.J. 195, 212 A. 2d 19, 21 (1965). There the court stated:

". . . . Now defendant complains that the trial court denied him his constitutional right to con-

duct his own defense. It is frequently said an accused has that right [citations omitted], but that right is not absolute. A man may defend himself if he can with fairness to the State and to the judicial process. Further, in capital cases, we have a policy against the imposition of a death sentence upon a plea of guilty, and upon that same policy would not permit a man at trial to default deliberately to that end. There is no indication that defendant is thus motivated; we mention the subject only because it is a factor which a trial court may have to weigh. Necessarily, there must be a considerable area of discretion in a trial court and its decision should not be rejected unless it was plainly improvident.

". . . . We do not disagree with the trial court's treatment of this problem albeit there ensued difficulties, of defendant's own making. But in the light of that experience with this defendant, we suggest the retrial be handled differently. Counsel should again be assigned. By now defendant must be fully aware of the difficulties of defending himself, and the hazards involved. If after consultation with counsel he informs the trial judge in open court that he does not wish the aid of counsel, he should, upon appropriate warning of the consequences of his choice, be permitted to conduct his own defense, with assigned counsel available at all times in the courtroom to advise or aid defendant as defendant may wish. *The trial court of course will remain free to depart from our suggestion as circumstances may indicate.*" (Emphasis added.)

An accused may ignorantly believe that he is better able to prepare and present his defense but tragically discover when the proceedings have concluded that he unwittingly deceived himself.

Petitioner seeks to define due process as the opportunity of a defendant in a criminal proceeding "to shape and present his defense according to his own lights." (Pet. Op. Br. p. 40.) It is urged again that, to the contrary, the guarantees of due process are to afford a defendant an objectively fair trial where only admissible evidence and legal defenses are presented. The constitutional rights enumerated by petitioner—the right to be present at all pertinent stages of the criminal trial; the right to present evidence; the right to take the stand in his own behalf; and the right to compulsory process for witnesses in his favor—all serve to guarantee a fair result and to do justice, and not to satisfy a defendant's subjective wish that the trial be conducted according to his whims. (Pet. Op. Br. p. 41.)

Petitioner argues that the right of an accused to present a defense as he sees fit is implicit in the Sixth Amendment clauses concerning confrontation and compulsory process.[10] Petitioner argues that the right to be present is derived from the confrontation and compulsory process clauses, and thus it is implicit in that right to be present that a defendant has the right to present his defense as he sees fit. (Pet. Op. Br. pp. 41-42.)

The rights enumerated in the Sixth Amendment, such as the right to confrontation and the right of com-

[10]The Sixth Amendment provides that "the accused" has the right "to be confronted with witnesses against him" and has the right "to have compulsory process for obtaining witnesses in his favor."

pulsory process, are specific rights deemed necessary in order to afford an accused a fair trial and to give him the ability to defend against the charges against him. *Cf. Pointer v. Texas,* 380 U.S. 400, 404 (1964). These goals are fulfilled when a defendant is present at trial with counsel and is afforded the opportunity to cross-examine witnesses and has the ability to call witnesses to support his defense.

No right of an accused to present his defense as he sees fit is implicit in the right to be present at pertinent stages of a criminal trial.[11] The right to be present derives from the Confrontation Clause.[12] The goals of the right to confrontation are fulfilled when a defendant is able to see his accusers face-to-face, and is given the opportunity to cross-examine them. *Mattox v. United States,* 156 U.S. 237, 242-43 (1895); *Pointer v. Texas, supra,* 380 U.S. at 404. These goals are further satisfied when the accused has the opportunity to communicate with his counsel to make suggestions. *Cf. Illinois v. Allen, supra,* 397 U.S. at 344.

Petitioner points out that this Court, when discussing an accused's right to be present at trial, in *Snyder*

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[11]By his actions a defendant can waive his right to be present at trial and the trial can be conducted in his absence. *Illinois v. Allen,* 397 U.S. 337 (1970); *Taylor v. United States,* 414 U.S. 17, 19-20 (1973).

[12]This Court has held that the right to be present is derived from the Confrontation Clause of the Sixth Amendment. *Illinois v. Allen, supra,* 397 U.S. 337 (1970); *Lewis v. United States,* 146 U.S. 370 (1892). This Court has also held that the right to be present at trial is a fundamental aspect of due process of law. *See Hopt v. Utah,* 110 U.S. 574 (1884); *Schwab v. Berggren,* 143 U.S. 442 (1892); *Dowdell v. United States,* 221 U.S. 325 (1911); *Snyder v. Massachusetts,* 291 U.S. 97 (1934). Respondent has not found any cases and petitioner has not cited any cases that indicate that the right of the accused to be present at pertinent stages of a criminal trial is derived from the compulsory process clause. (*See* Pet. Op. Br. p. 42.)

v. Massachusetts, 291 U.S. 97, 106 (1934), observed in passing:

> ". . . Again, defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestions or even to supersede his lawyers altogether and conduct the trial himself." (Pet. Op. Br. p. 42.)

In making this observation, the Court in *Snyder* was in no way dealing with the issue of a possible right of self-representation, but was deciding whether a defendant has the right to be present when a jury views the scene of the crime. This passage should not be read as suggesting that the right to be present means that there is a constitutional right to defend oneself. Clearly the Court did not so hold. On the contrary, the Court appears to have been considering possibilities as to what might occur or what an accused might do if he was present at trial.

The discussion in *Snyder* concerning the right to be present was grounded on the idea that "the right to be present is a condition of due process to the extent that a fair and just hearing will be thwarted by his absence . . . ." 397 U.S. at 107-08. As has been discussed previously, due process requires a fair trial and does not require that a defendant be allowed to conduct his own defense.

Petitioner points out that when a defendant is represented by counsel in the California courts, counsel has the authority to make a number of binding decisions.[18]

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[18]In *People v. Robles*, 2 Cal.3d 205, 215, 85 Cal.Rptr. 166, 172, 466 P.2d 710, 716 (1970), the California Supreme Court

(This footnote is continued on next page)

(Pet. Op. Br. pp. 18-21.) The general nature of these decisions require that they be made by someone with legal knowledge and experience beyond that normally possessed by the layman accused of crime. Again, the layman's need for counsel at trial was expressed by Justice Sutherland:

> ". . . . Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Powell v. Alabama, supra,* 287 U.S. at 69.

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held that although an attorney representing a criminal defendant has the power to control the court proceedings, "that power may not be exercised to deprive a defendant of certain fundamental rights." *Robles* held that a defendant has the right to testify in his own defense over the objection of his counsel. Additionally, under California law, a defendant must expressly waive his right to a jury trial (Cal. Const., art. I § 7; *People v. Holmes,* 54 Cal.2d 442, 444, 5 Cal.Rptr. 871, 872, 353 P.2d 583, 584 (1960)), and must personally waive certain constitutional rights when pleading guilty (*In re Tahl,* 1 Cal.3d 122, 132-33, 81 Cal. Rptr. 577, 584-85, 460 P.2d 449, 456-57 (1969), *cert. denied,* 398 U.S. 911 (1970)).

The decisions cited by petitioner which put counsel in charge of the management of the defense really illustrate respondent's point that the courts seek to provide an accused with a fair trial where he will be able to defend against the charges and not with a trial that defendant can exclusively plan and direct. These decisions would seem to contradict petitioner's assertion that the core of due process is to allow a defendant to shape his own defense. (*See* Pet. Op. Br. p. 40.)

Petitioner additionally points out that an indigent has no right to select counsel of his choice. (Pet. Op. Br. pp. 21-23.) This point would appear to be in conjunction with the argument that a defendant need be able to communicate and have confidence in his attorney. (Pet. Op. Br. p. 44.) But a defendant may be a sociopath who could get along with no one. Furthermore, the accused could suffer from mental deficiency or insanity or other types of illnesses of the mind that would make it impossible for him to have any significant rapport with any specific attorney. A trial is not a "popularity contest" to be won by smiles and handshakes, but rather serious business to be decided by the best technical minds available. In reality, if an indigent accused facing trial were allowed to select an attorney, he would have great difficulty determining whether he would be able to communicate with and have confidence in a particular attorney. Furthermore, if counsel is appointed, and if later the accused decides that he wants another attorney appointed, the courts are generally reluctant to interrupt proceedings to allow for a new appointment. *Cf. United States v. Grow*, 394 F.2d 182, 209 (4th Cir. 1968); *cert. denied*, 393 U.S. 840 (1968); *Arellanes v. United States*, 326 F.2d 560, 561 (4th Cir. 1964); *People v. Williams*, 2 Cal.3d 894, 904-

05, 88 Cal.Rptr. 208, 214-15, 471 P.2d 1008, 1014-15 (1970), *cert. denied*, 401 U.S. 919 (1971).

Thus, the conclusion must be reached that due process does not require that a defendant be allowed to represent himself. The concept of due process is to insure that a defendant receives a fair trial and the developing law has been to insure him counsel so as to achieve that end. This Court in *Singer v. United States, supra*, 380 U.S. at 36 (1965), stated:

> "We find no constitutional impediment to conditioning a waiver of this right [trial by jury] on the consent of the prosecuting attorney and the trial jury when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him."

Applying the *Singer* rationale to the issue as to whether a defendant has a right to represent himself, if a defendant is not allowed to represent himself, the result is simply what the Constitution guarantees him—a trial where he is represented by counsel.

D. A Policy of Representation by Counsel Insures Fair and Efficient Court Procedure

Petitioner further argues that there are no considerations of judicial administration that would warrant non-recognition of the "right of self-representation." (Pet. Op. Br. p. 58.) Rather, the desire for an orderly and fair trial would instead negate self-representation as being a constitutional right. In the recent case of *Illinois v. Allen, supra*, 397 U.S. 337, 343 (1970), this Court held that an unruly defendant could be removed from court in the course of his trial because of miscon-

duct. As Justice Black wrote for this Court in the *Allen* case:

> ". . . . It is essential that in the proper administration of criminal justice that dignity, order and decorum be the hallmarks of all court proceedings in our country." *Id.*

Dignity, order and decorum are most important if both the defense and the prosecution are to receive a fair trial. This Court made clear in *Illinois v. Allen, supra,* 397 U.S. 337, 346, 347, "But, if our courts are to remain what the Founders intended, the citadels of justice, these proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case." To allow an untrained layman to have a "right" to self-representation would defeat the purpose of a fair trial whether done intentionally or nonintentionally by the accused.

In *Mayberry v. Pennsylvania,* 400 U.S. 455, 462 (1970), this Court stated: "Laymen foolishly trying to defend themselves may understandably create awkward and embarrassing scenes." Yet if a defendant who represents himself is unruly and must be forced from the courtroom and is not represented by counsel, there is no party to represent him in the trial court. For example, in the recent case of *Taylor v. United States, supra,* 414 U.S. 17, 20 (1973), this Court held that a trial may continue even if a defendant who is being tried has fled in the course of his trial and is not present at the proceedings. To allow a defendant a right to self-representation would be to place the court in a true predicament because if the defendant is unruly or flees the jurisdiction of the court, the trial may continue

and would, quite unintentionally, have the same effect as an inquisitorial hearing without the benefit of any defense whatsoever.

Petitioner argues, however, that the trial judge, by advice and suggestion, should assist the defendant. (Pet. Op. Br. p. 55.) However, as observed in the preceding discussion of history of the common law, this line of argument was the excuse which prevented counsel from being appointed in felony cases for centuries in England. While, no doubt, a trial judge would try to be fair to both sides, he first of all should be an impartial referee and cannot, by his very nature, assume the role of an advocate in order to provide a proper defense.

Petitioner next suggests that advisory counsel should be appointed to assist the defendant as to his needs and wants. (Pet. Op. Br. pp. 55, 56.) In California, a defendant has no right to advisory counsel if he chooses to defend himself *in propria persona. See People v. Mattson,* 51 Cal.2d 777, 789, 336 P.2d 937, 946 (1959); *Ligda v. Superior Court,* 5 Cal.App.3d 811, 820, 85 Cal.Rptr. 744, 749 (1970); *People v. Adame,* 169 Cal.App.2d 587, 601, 337 P.2d 477, 487 (1959), *cert. denied,* 361 U.S. 969 (1960). No such requirement appears to exist in the federal courts. *See Lee v. State of Alabama,* 406 F.2d 466, 469 (5th Cir. 1968), *cert. denied,* 395 U.S. 927 (1969); *Duke v. United States,* 255 F.2d 721, 725 n. 7 (9th Cir. 1958), *cert. denied,* 357 U.S. 920 (1958); *Manson v. Pitchess,* 317 F.Supp. 816, 824 (C.D. Cal. 1970); *Lopez v. Pitchess,* 256 F.2d 136, 142 (C.D. Cal. 1967).

To make "advisory counsel" a "right" would truly confuse the issue as the question would be raised time

and again to what extent his counsel's role in the trial was purely advisory and how "advisory" is to be defined. Furthermore, a question would be raised as to what extent the "advisory counsel" could take a more aggressive role in the trial if a defendant became either unruly or fled in the course of the trial. The ramifications of "advisory counsel" would be so manifold as to cause untold confusion, and it would be merely another obstacle in the path of justice which is already far overclogged with court calendars. *Cf.* Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?*, 17 U.C.L.A. L. Rev. 339, 393, 394 (1967).

Another problem is also raised by giving a defendant a right to represent himself. A defendant may be insane or at the most mentally deficient and, thus, not be properly qualified to represent himself even though he may have sufficient presence of mind to waive counsel. Some defendants are narcotics addicts who may be going through mental or physical withdrawal as a result of not being given their drug dosage. To provide for a right of self-representation in such cases would defeat the whole purpose of a fair trial since they could not properly judge in an objective manner what might be a proper defense. For example, California has a very sophisticated defense known as diminished capacity. Diminished capacity is a defense relating to reduced culpability from mental states because of mental illness, mental defect or mental disease or intoxication. If a defendant cannot attain a certain state of mind required to commit a crime or a certain degree of that crime, he cannot be found guilty of that crime or that degree. *People v. Conley*, 64 Cal.2d 310, 44 Cal. Rptr. 815, 411 P.2d 911 (1966); *People v. Gor-*

shen, 51 Cal.2d 716, 336 P.2d 492 (1959); *People v. Wells,* 33 Cal.3d 330, 202 P.2d 53 (1949); *cert denied,* 388 U.S. 836 (1949).

It would be impossible for a defendant to set up a proper defense based upon mental deficiency, whether insanity or diminished capacity, because of (a) the necessity for examination of expert witnesses; (b) a deep understanding of the complex legal standards for these defenses; and (c) an objective acceptance of the applicability of these defenses.

Moreover, in certain cases, if a defendant's lack of skill or his ignorance is extreme and the case is very complex, then a fair trial demands that he be represented by counsel. *Cf. McNeal v. Culver,* 365 U.S. 109, 114 (1961). The court in *Massey v. Moore,* 348 U.S. 105, 108 (1954), stated:

> ". . . . We have not allowed convictions to stand if the accused stood trial without benefit of counsel and yet so unskilled, so ignorant, or so mentally deficient as not to be able to comprehend the legal issues involved in the case."

Mental defenses are not the only technical principles a defendant might have to master. Defense of "so-called white collar crimes" mandates a knowledge of specific elements. Proper forms and motions for exclusion of alleged tainted evidence and statements must be thoroughly understood. Criminal law is a complex area, becoming more complex as time passes, with rapid changes of legal standards in this field. A layman could only be crushed by the torrent of complexity and intricacy that so encompasses criminal law.

Petitioner also argues that the quality of various attorneys and the caseload of the public defender's office might inhibit his gaining as good representation as is possible and therefore, a defendant should be able to represent himself if he so chooses. (Pet. Op. Br. pp. 52, 53.) Fortunately or unfortunately, the legal profession is the same as any other profession and its practitioners' skill and knowledge vary as widely or narrowly as any other profession or vocation. However, it can be presumed that even the most minimal representation by a member of the Bar would be preferable to that of a layman attempting to find his way in the complexity of the law.

In addition, there are safeguards as to the quality of representation of counsel by reason of appellate review of effectiveness of a trial attorney on appeal. However, petitioner argues that the standard in California is not adequate since for a defense attorney to be incompetent, misrepresentation must have been such as to reduce the trial to a farce and a sham. *People v. Ibarra,* 60 Cal.2d 460, 464, 34 Cal.Rptr. 863, 866, 386 P.2d 487, 490 (1963). (Pet. Op. Br. p. 23.) Unfortunately, most laymen defending themselves would by the very nature of their ignorance and the tenseness of the situation force the trial into a farce and a sham. Appellate rules of incompetence of counsel at least keep representation within certain bounds. Thus, with these safeguards in mind, the quality of representation is never allowed to become so deficient as to mandate a conclusion that an accused should have an absolute right to appear without counsel. *Grano* at 1175, 1198.

II.

EVEN IF THERE WERE A CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION, IT IS A LIMITED RIGHT AND THE FOLLOWING STANDARDS SHOULD APPLY

A. A Defendant Who Represented Himself at Trial Should Not Be Allowed to Raise the Issue of the Quality of That Representation on Appeal

Petitioner concedes that the defendant who represents himself "will not be heard to complain of the quality of his own performance." (Pet. Op. Br. p. 55.) The case law supports this concession. Courts that have held that an accused has a right to defend himself have also held, when appealing a conviction or seeking collateral relief, the defendant cannot argue that his trial was unfair because he represented himself or raise issues concerning irregularities that occurred during trial as a result of the manner in which he represented himself. *See Smith v. United States,* 216 F.2d 724, 727 (5th Cir. 1954). As was stated by the Supreme Court of Minnesota in *State v. Huber,* 275 Minn. 475, 148 N.W.2d 137, 142 (1967):

> ". . . . Where [an accused] elects to [conduct own defense] . . . with full knowledge and understanding of the risk involved, he should not expect to have a new trial because of irregularities which grew out of the manner in which he decided to conduct his defense."

It would be unconscionable to permit a defendant to represent himself knowing that if he blunders he can always have a new trial because of his incompetency.

This issue was discussed by the court in *United States v. Redfield,* 197 F.Supp. 559, 575 (D. Nev. 1961), where it stated:

> "Defendant has hit on quite a scheme: waive counsel, take your chances with the jury, then if the jury disappoints you, merely point out that you had a poor substitute for a lawyer, thereby gaining another trial with the concomitant chance that you will find one juror who will keep you from paying the penalty which the law exacts . . . . Some court other than this one will have to sanction such a subterfuge."

An accused cannot be in a position where he can manipulate the proceedings so that if he is not acquitted at trial, he will gain a reversal on appeal. Thus, a defendant who chooses to represent himself at trial should not be allowed on appeal to raise the issue of the quality of his own representation.

Furthermore, the trial court faces a dilemma if a defendant seeks to represent himself because it needs to determine whether the defendant made an "intelligent and understanding" waiver of the right to counsel. *Johnson v. Zerbst, supra,* 304 U.S. at 464.

Cunning defendants will take advantage of this dilemma and the demand for self-representation becomes a "heads I win tails you lose" proposition. If a trial court too readily grants the demand for self-representation an appellate court may find the waiver of counsel to be ineffectual. On the other hand, if the trial court seeks to protect the defendant's right to counsel, the

appellate court may find that he was denied his right to represent himself.

This dilemma supports the proposition that a defendant should not be afforded the right to represent himself. If it is held that a defendant does have such a right, then this Court should severely limit an accused's right to raise on appeal the issue of the trial court's decision granting his demand to represent himself.

B. The Denial of Self-Representation Is Subject to the Harmless Error Test

Petitioner in his brief points out that the California Supreme Court in *People v. Sharp, supra,* 7 Cal.3d 448, 104 Cal.Rptr. 233, 499 P.2d 489 (1972), held that the Federal and California Constitutions do not guarantee the right of self-representation. (Pet. Op. Br. p. 29.) But the California Supreme Court did not hold that a defendant may never represent himself. The court indicated that an accused would be allowed to represent himself in a proper case, and the guidelines to be followed were those set forth in *People v. Floyd,* 1 Cal.3d 694, 702-03, 83 Cal.Rptr. 608, 703, 464 P. 2d 64, 68 (1970), *cert. denied,* 406 U.S. 972 (1972), where it was stated:

> ". . . . 'the defendant's right to represent himself cannot be denied simply because he is unable to demonstrate either the acumen or the learning of a skilled lawyer.' [Citations.] A defendant may waive counsel and choose to represent himself only if the defendant has an intelligent conception of the consequences of his act [citations] and understands the nature of the offense, the available pleas and defenses, and the possible punishments. [Citations.]"

The court in *Sharp* went on to state that when reviewing a trial court's discretion in denying a motion to defend *in pro. per.*, any error would not be regarded as one of constitutional dimension. If there was error, the test to be applied was whether, on review of the entire record, it was reasonably possible that a result more favorable to defendant would have reached had he represented himself. *Cf. People v. Watson*, 46 Cal.2d 818, 837, 299 P.2d 243, 254-55 (1956), *cert. denied*, 350 U.S. 846 (1957).

If this court should hold that there is a constitutional right of self-representation, then the denial of that right should be subject to the harmless error test. This Court in *Chapman v. California*, 386 U.S. 18, 23 (1967), stated that some constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error . . . ." The Court indicated that examples of such rights were the prohibition against the use of a coerced confession, the right to counsel, and the right to an impartial judge. *Chapman v. California, supra*, 386 U.S. at 23 n. 8.

The denial of the right of self-representation should be subject to the harmless error test because it is not a right "basic to a fair trial." As was argued previously, a fair trial is achieved when one is represented by counsel. Thus, the nature of the interests a defendant loses if he is denied the right to defend himself, such as the right to control the presentation of his defense, are such that their denial does not render a trial fundamentally unfair.

Moreover, even the Second Circuit, which has decided some of the leading cases holding that there is a right to self-representation, has held that the denial of the right to defend oneself is not reversible error where

no prejudice is shown. *United States v. Albamonte*, 348 F.2d 700, 704 (2d Cir. 1965).

Furthermore, the Second Circuit does not treat the "right" of self-representation the same as it does the right to assistance of counsel. Under Second Circuit cases, it is not constitutionally required that a defendant be advised of this "right" of self-representation. *United States v. Plattner, supra,* 330 F.2d at 276. Regardless of whether he has been advised of this right, the defendant must make an unequivocal request to act as his own lawyer in order to invoke the right. *United States ex rel. Maldonado v. Denno, supra,* 348 F.2d at 15.

Additionally, once the trial has begun, the defendant no longer possesses the absolute right to defend himself. A balancing test is then employed:

> ". . . . Once the trial has begun with the defendant represented by counsel, however, his right thereafter to discharge his lawyer and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance." *United States ex rel. Maldonado v. Denno, supra,* 348 F.2d at 15. *See Dearinger v. United States,* 344 F.2d 309, 311 (9th Cir. 1965); *United States v. Private Brands,* 250 F.2d 554 (2d Cir. 1957); *United States v. Mitchell,* 137 F.2d 1006 (2d Cir. 1943).

Therefore, the right of self-representation is not one of those rights "so basic to a fair trial that their infraction cannot be treated as harmless." Thus, the denial of that right is subject to the *Chapman* harmless error test.

Conclusion

For the foregoing reasons, respondent submits that under the Federal Constitution an accused has no right to represent himself at trial. No such alleged constitutional right can be found in the annals of Anglo-American jurisprudence. Furthermore, the express absence of such a "right" in the Bill of Rights implies that it was purposely omitted and could not be a correlative right to "assistance of counsel." Due process, rather than recognizing a right of self-representation, favors counsel, to insure a fair trial. For there to be due process, a defendant must receive an objectively fair trial and not simply "be allowed to go to jail under his own banner," irrespective of whether he presents a competent defense. Fair and efficient court proceedings which protect both the rights of the People and the accused support a policy of representation by counsel. As such the judgment should be affirmed.

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